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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH GENTILE, JR., Defendant and Appellant.	E069088 (Super.Ct.No. INF1401840) OPINION

APPEAL from the Superior Court of Riverside County. Graham A. Cribbs, Judge. Affirmed as modified.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant Joseph Gentile, Jr.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton, James H. Flaherty III and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Joseph Robert Gentile, Jr., was charged with first degree murder (Pen. Code,[1] § 187, subd. (a)), in connection with the beating death of Guillermo Saavedra. A jury convicted him of the murder but found untrue an allegation that he used a deadly or dangerous weapon. Defendant was sentenced to 25 years to life, and the prosecution dismissed an allegation that he had a prior conviction for which he had served a prison term. (§ 667.5, subd. (b).) This is his second appeal.

In his first appeal, defendant argued for reversal raising seven issues, including a claim that the court erroneously instructed the jury it could convict him of first degree murder under the doctrine of natural and probable consequences. We reversed the conviction for first degree murder based on the California Supreme Court's decision in *People v. Chiu* (2014) 59 Cal.4th 155 and remanded the matter for the People to decide whether to accept a reduction to second degree murder, or to retry defendant for first degree murder under theories other than natural and probable consequence. We did not reach the six other issues. On remand, the People accepted the reduction to second degree murder and defendant was resentenced to an indeterminate term of 15 years to life. Defendant appealed again.

In this appeal, defendant raises anew the issues we left unresolved in the first appeal, namely that (1) the court erroneously instructed the jury on a failure to rescue/breach of duty of care theory of liability for murder; (2) the court erred by failing to instruct sua sponte on the lesser included offense of involuntary manslaughter on a

[1] All further references will be to the Penal Code, unless otherwise indicated.

misdemeanor battery theory; (3) the court failed to instruct on involuntary manslaughter on a breach of duty of care theory; (4) the jury was erroneously informed of defendant's prior conviction and prison term when an errant verdict form for the prior conviction was submitted; (5) the conviction was tainted by cumulative prejudice resulting from multiple instructional errors combined with the error of informing the jury of the prison prior; and (6) the court facilities assessments should be reduced.[2] We affirm as modified.

BACKGROUND

We take the facts from our previous opinion, *People v. Gentile* (Feb. 27, 2017, E064822 [nonpub. opn.]), pages 3-11:

Objectively Established Facts

The undisputed facts show that prior to June 21, 2014, Guillermo Saavedra lived in the back of the La Casita restaurant in Indio, acting as property caretaker and handyman. On June 23, 2014, at 7:30 a.m., the owner of the property and his son happened to drive past the restaurant and noticed the lights were on, which seemed unusual. They entered the restaurant when Saavedra did not respond and found Saavedra

[2] Prior to oral argument, defendant sought leave to file a supplemental brief to discuss whether Senate Bill 1437 applied to this case. That bill, when it becomes effective, will eliminate liability for murder based on the natural and probable consequences doctrine. (See § 188, subd. (a)(3), rev. eff. 1/1/19.) However, it does not preclude convictions for second degree murder where the defendant is an active aider-abettor. We denied defendant's request because he was, at a minimum, an active aider abettor, if not the actual killer, for which a reduction to second degree murder was appropriate, pursuant to *People v. Chiu* (2014) 59 Cal.4th 155, 166.

laying on the floor, dead. Outside, in the parking lot, they found Saavedra's cell phone. The police were contacted.

When they arrived at the restaurant, the police found the victim's body, along with a broken chair, a golf club, a wooden stick with blood, and a broken bottle near the body. The victim's cell phone was found in the grass just north of the building. Investigators documented three sets of bloody footprints, at least one of which was a shoeprint, and one of which appeared to have been made by a sock or bare foot. Detectives also collected surveillance videos from the Royal Plaza Inn and from the nearby laundromat. The police obtained and executed various search warrants after viewing evidence on the surveillance tapes of the nearby Royal Plaza hotel and the laundromat. After reviewing those surveillance videos, police officers visited the areas and found a sock on a bush at the property located between the hotel and the laundromat. The sock appeared to have a reddish-brown substance on it.

Also undisputed are certain movements by defendant and his estranged wife, Saundra Roberts, captured on the surveillance videos. At 1:03 a.m. on June 22, 2014, the defendant approached the night entrance of the Royal Plaza Hotel in Indio and pressed the buzzer. Defendant then went to the door of the hotel manager's apartment, seeking to rent a room. He appeared intoxicated, so the manager declined to rent him a room, although defendant and Roberts were regular tenants, renting a room from her two or three times per month.

The hotel manager also managed the coin-operated laundry located near the hotel. Surveillance video from that location showed Roberts talking with her on-again-off-again boyfriend, Stephen Gardner. Gardner had been contacted by Roberts, who asked him to bring a pair of shorts, a shirt and socks to the laundromat. Roberts sounded panicked, so Gardner thought she was in trouble. He took the clothes to the laundromat where he found Roberts with defendant, which made him angry. The defendant appeared to be wet, and his hands were red.

The victim suffered multiple fractures of his ribs, collarbone, and parts of the spinal structure, as well as lung hemorrhage. The injuries would have required significant blunt force. From the nature of the injuries, the pathologist opined that multiple blunt impact injuries caused the death. The pathologist also noted that the victim had coronary disease that may have led to heart failure, as a result of the beating. The injuries to Saavedra were probably inflicted with fists, a golf club, a beer bottle, and a chair. The pathologist described the cause of death as a heart attack caused by multiple blunt force injuries.

DNA testing of the blood on the sock and the head of the broken golf club matched the victim, Saavedra. There was also DNA that was consistent with defendant's profile as a minor contributor on the sock, as well another person's DNA, which the analyst could not identify due to the complex nature of the mixture. A cigarette butt recovered at the scene contained a mixture of Roberts' and Saavedra's DNA. A second cigarette butt had only one DNA profile, belonging to Saavedra, while a third butt had

defendant's DNA on it. Swabs from the golf club head were analyzed and found to contain a mixture of two persons' DNA, but the profile belonging to Saavedra was the only one that could be identified. The swab from the golf club grip had DNA from three people.

In Court and Out of Court Statements

Roberts gave various accounts of the events. At trial, she testified that she called defendant for help moving from Stephen Gardner's residence on Friday, June 21, 2014, so defendant sent a young man with a truck to move her belongings. She was moving her belongings to the restaurant at which Saavedra, her dear friend, worked security and lived. The restaurant was her "safe house" when she was "at odds" with Gardner. Roberts wanted to introduce defendant to Saavedra because Saavedra wanted to meet defendant. Saavedra wanted to meet defendant because they both had backgrounds serving in the Marines. Later, Edward Cordero, one of defendant's house mates, dropped defendant off at the restaurant.

At the restaurant, the three people drank many beers and martinis over the evening. At one point, Roberts went out to purchase more alcohol, and when she returned, the defendant and Saavedra were still in conversation. At some point, the two men raised their voices at each other, but they did not fight. Eventually, Roberts felt both drunk and like a third wheel, so she left the two men and went to her homeless camp to sleep it off. When she left, there had not been any fighting.

In this version, Roberts indicated that she awoke at around 1:00 or 1:30 a.m., and went to a nearby AM/PM store to buy cigarettes; when she came out she saw defendant across the street at the Royal Plaza Inn hotel. She saw him walk through the parking lot and was curious why he had not gone home. Defendant told her he was trying to get a room at the hotel but was unsuccessful. Defendant was dressed in the same clothes he had worn earlier but his clothes appeared wet.

For this reason, Roberts contacted Gardner and asked him to bring her some clothes at the laundromat. Gardner was unaware that Roberts wanted the clothing for defendant, so he was surprised and angry to see defendant at the laundromat when he showed up with the items. Gardner brought a pair of shorts, a tie-dyed tee shirt, and a single sock.[3] Later, Roberts went to Gardner's place but he ran her off because he was angry. She went back to her homeless camp to sleep and that was the last she saw of defendant or Gardner.

Prior to trial, Roberts gave three other and different statements during interviews with police. In the first pretrial statement, Roberts testified she was living at the restaurant where Saavedra worked, although her relationship with the victim was purely platonic. She did not mention defendant sending a young man with a truck to move her to the restaurant. On Saturday, the defendant called her and wanted to meet with her and get a room with her, although she said it had been 16 months since she had been with

[3] Gardner had left one sock in his van when he delivered the clothing.

defendant.[4] In this version, Roberts indicated she went to Saavedra's place, spoke of the martinis she had made, and discussed how defendant and Saavedra talked about their military backgrounds. She described how she went out to buy more alcohol, and that the next morning, when she saw defendant, he told her he had gotten to a brawl.

A few days after giving her first statement to police, Roberts was interviewed again; this time, the officers wanted her to focus on the events of Saturday. Roberts again told the officers defendant had called her that day, and that she spoke to him in the morning; when she met up with him, defendant was drunk, belligerent, and not himself. After ditching defendant following a trip to her storage unit, she met up with him again at the Jack-in-the-Box restaurant, where they got into an argument and went their separate ways. However, she went with defendant to the Royal Plaza Inn that Saturday before noon. Then she was dropped off at the La Casita restaurant in a white car. Saavedra had talked to defendant and invited him over, so defendant showed up at the restaurant at about 8 p.m., but Saavedra was not there. Roberts and defendant went to the store to purchase beer and got into another argument. Roberts returned to the restaurant without defendant, and Saavedra had returned. Saavedra told her they should go get the defendant if he were drunk, so Roberts went back and told defendant that Saavedra wanted to meet him.

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[4] There is actually some corroboration for this statement, because the hotel manager testified that defendant had contacted her earlier on June 21, 2014, to reserve a room for the night. However, the hotel manager indicated that defendant and Roberts were regular customers.

In this second interview, Roberts repeated the information about Saavedra and defendant discussing their military service, Vietnam in particular, when she went out to purchase more alcohol. When she returned, their voices were raised, but they were not physical. Roberts left to go to her camp, and defendant stayed at the restaurant. She awoke at around 1:30 or 2:00 a.m. to go to the AM/PM market, where she saw defendant across the street at the Royal Plaza hotel. His clothes were soaking and he told her he could not find his phone, and something about getting into a fight. Specifically, Roberts reported that he had said he had been in a bad fight and that he might have killed the man, that he had hurt him pretty bad. He also said he needed clothes. Also, during this second interview, Roberts stated defendant smelled like blood and that she thought she saw blood on his shoes. However, defendant was wearing sandals, according to the surveillance videos.

Roberts was interviewed a third time after the defendant's arrest. She told officers she had spoken by telephone with Charolette Sullivan, a long-time friend of defendant's and hers. In this interview, officers were again trying to clarify the events of Saturday, June 21, 2014. In this statement, Roberts told officers she had wanted to keep Saavedra's place a secret from defendant, although at trial she stated she wanted to keep it secret from Gardner.

Defendant asked his brother for a ride, but his brother declined. According to the brother's statement to police (which the brother refuted at trial), defendant told his brother he had done something bad and needed to leave. Defendant called his house-

mate and coworker Susan Champion that he was leaving and would not be returning, although she denied this at trial. On Sunday, June 22, 2014, defendant asked his housemate and coworker Edward Cordero for a ride to Imperial Beach. Cordero frequently gave rides to defendant, who did not have a car. Cordero dropped defendant off at Imperial Beach and returned a short time later.

Defendant's longtime friend, Charolette Sullivan lived in Imperial Beach, and had invited defendant to visit over the Fourth of July weekend. However, defendant called to ask if he could come down earlier, and, when Sullivan agreed, defendant arrived that same day. Defendant appeared to be sad, and his hands appeared swollen, but he did not immediately mention being in a fight with anyone. He attributed the swelling to arthritis.

Eventually, defendant disclosed to Sullivan he had gotten into a fight with someone and had hit him, but that when the victim apologized, defendant stopped. However, afterwards, defendant stated that Roberts picked up some kind of club and started swinging at the man. Later, Roberts also called Sullivan, and more or less confirmed the defendant's version. Roberts told Sullivan that Saavedra had raped her and that defendant was upset about it. Roberts said that both defendant and Saavedra got really drunk and were talking about Marines stuff when Roberts mentioned to defendant that Saavedra had raped her in that same restaurant. Roberts indicated that she left, and when she did, the defendant and Saavedra got into a fight. Roberts indicated she went back later and bleached everything.

On June 28, 2014, police executed a search warrant of the residence of Charolette Sullivan, where they arrested defendant. In the garage where defendant was staying, there was a blue backpack and beach bag, along with a piece of paper that had writing on it. In the backpack, officers found a tie-dyed tee shirt and four Hawaiian shirts.

Following his arrest, defendant was interviewed. In the interview, defendant described how Cordero had dropped him off at the La Casita restaurant to meet Roberts, where there was a man (the victim) defendant did not know. Roberts had told defendant she was staying at the restaurant in exchange for watching the restaurant. Roberts told defendant that the other man present had been raping her. The man admitting raping Roberts and said he was sorry. Defendant struck the man three or four times in the face, using his hands. Roberts then said that the man would never rape her again, and began hitting the victim with a club or what appeared to the defendant to be a sledgehammer. Defendant took the object away from Roberts, but she retrieved it and resumed hitting the victim. Defendant took the weapon away a second time, threw it on the ground, asked her what she was doing, and then left. Defendant denied ever striking the victim with a weapon.

Legal Proceedings

Defendant was charged with one count of premeditated murder (§ 187, subd. (a)), along with personal use of a deadly weapon (§ 12022, subd. (b)(1)), and one prison prior. (§ 667.5, subd. (b).) Following a jury trial, defendant was convicted of first degree murder, but the jury did not make a true finding as to the weapon use allegation. The

prison prior was dismissed, and defendant was sentenced to an indeterminate term of 25 years to life in prison. He appealed.

On February 27, 2017, we reversed the conviction for first degree murder based on the recent California Supreme Court case of *People v. Chiu, supra,* 59 Cal.4th 155, and remanded the matter to the trial court for the People to elect whether to retry defendant or accept the reduction in degree, without reaching the remaining issues. (*People v. Gentile, supra,* E064822, as modified with change in judgment on Mar. 22, 2017, typed opn. p. 1.) On remand, the People accepted the reduction of the degree of the offense to second degree murder, and defendant was resentenced to an indeterminate term of 15 years to life. Defendant objected because there were five issues unaddressed. This appeal followed.

DISCUSSION

Defendant raises a number of instructional issues on appeal that were raised in in the first appeal. In that appeal, the People conceded *Chiu* error, and we agreed that the jury was improperly instructed on an impermissible natural and probable consequences theory of guilt. However, we did not reach defendant's other points. We do so now.

1. *Instructional Errors*

Before addressing each of defendant's instructional claims, we summarize the general principles relating to review of instructional errors.

In criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. (*People v.*

Breverman (1998) 19 Cal.4th 142, 154.) The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. (*People v. St. Martin* (1970) 1 Cal.3d 524, 531.)

Upon an appeal taken by the defendant, we may, without an objection having been taken in the trial court, review any instruction given, refused or modified, even though no objection was made in the lower court, if the substantial rights of the defendant were affected thereby. (§ 1259.) "'Failure to object to instructional error forfeits the issue on appeal unless the error affects defendant's substantial rights. [Citations.] The question is whether the error resulted in a miscarriage of justice under *People v. Watson* (1956) 46 Cal.2d 818. [Citation.]' [Citation.]" (*People v. Battle* (2011) 198 Cal.App.4th 50, 64-65; *People v. Anderson* (2007) 152 Cal.App.4th 919, 927.)

In reviewing a claim that the court's instructions were incorrect or misleading, we must determine whether there is a reasonable likelihood the jury understood the instructions as asserted by the defendant. (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332, citing *People v. Cross* (2008) 45 Cal.4th 58, 67-68.) We consider the instructions as a whole and assume the jurors are intelligent persons capable of understanding and correlating all the instructions. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088, quoting *People v. Yoder* (1979) 100 Cal.App.3d 333, 338.) We make our determination using the independent or de novo standard of review. (*People v.*

Ramos, supra, 163 Cal.App.4th at p. 1088; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1211.)

"The erroneous failure to instruct on a lesser included offense generally is subject to harmless error review under the standard of *People v. Watson* (1956) 46 Cal.2d 818, at pages 836–837. Reversal is required only if it is reasonably probable the jury would have returned a different verdict absent the error or errors complained of." (*People v. Rogers* (2006) 39 Cal.4th 826, 867-868 citing *People v. Breverman*, *supra*, 19 Cal.4th at pp. 165–179.)

a. *The Modification of CALCRIM No. 520 Adding Language re Failure to Rescue/Breach of Duty of Care Theory.*

When discussing the instructions, the People argued that defendant's act of leaving the victim to the devices of Roberts, under circumstances in which he knew or reasonably should have known that Roberts would kill him, was a conscious omission that aided and abetted the murder. Defendant did not object to the inclusion of the optional bracketed language in CALCRIM No. 520 and did not request instructions on involuntary manslaughter.[5]

The court instructed the jury on the mental state of malice aforethought, required in order to convict defendant of murder, and explained the difference between express and implied malice. (CALCRIM No. 520.) It also instructed the jury on the People's

[5] We will discuss defendant's related claim on the court's failure to instruct on the lesser included offense of involuntary manslaughter *post.*

theories that either defendant directly beat the victim to death or defendant originally intended to aid and abet the commission of an aggravated assault, of which the murder was the natural and probable consequence.

As given by the court, the instruction included the bracketed language: "A person has a legal duty to rescue the person to whom duty is owed. [¶] If you conclude that the defendant owed a duty to rescue, and the defendant failed to perform that duty, his failure to act is the same as doing a negligent or injurious act." The bench notes accompanying the instruction indicate that the bracketed portion is to be given "[i]f the prosecution's theory of the case is that the defendant committed murder based on his or her failure to perform a legal duty [. . .]." (CALCRIM No. 520, Bench Notes.) No further instructions were given defining the legal duty, or explaining who had the burden of proving such duty.

"Generally, one has no legal duty to rescue or render aid to another in peril, even if the other is in danger of losing his or her life, absent a special relationship which gives rise to such duty." (*People v. Oliver* (1989) 210 Cal.App.3d 138, 147, citing *Williams v. State of California* (1983) 34 Cal.3d 18, 23-24, and other sources.) Unlike the imposition of criminal penalties for certain positive acts, based on the statutory proscription of such conduct, an individual's criminal liability based on the *failure* to act only applies when the person is under an existing legal duty to take positive action. (*People v. Heitzman* (1994) 9 Cal.4th 189, 197; *Barber v. Superior Court* (1983) 147 Cal.App.3d 1006, 1017.)

A legal duty to act is often imposed by the specific provisions of a criminal statute. (*People v. Heitzman, supra*, 9 Cal.4th at p. 198.) The violation of such a statute does not require a specific intent, but only criminal negligence. (*Id.*, at p. 208, fn. 16, citing *People v. Manis* (1992) 10 Cal.App.4th 110, 114.) When a criminal statute does not create a legal duty to act by its terms, liability for a failure to act must be premised on the existence of a duty found elsewhere. (*Ibid.*) Such a duty may flow from the nature of the relationship between the defendant and the victim, such as the duty of parents to care for and protect their children, or other special relationships. (*People v. Heitzman, supra,* 9 Cal.4th at p. 198; see also, *People v. Valdez* (2002) 27 Cal.4th 778, 785-786.)

The omission or neglect to perform a duty resulting in death may constitute murder where the omission was willful and there was deliberate intent to cause death, or where the omission must necessarily lead to death, such that willfully allowing one to be exposed to conditions which will probably result in death, where there is a duty to protect such person, constitutes murder. (*People v. Burden* (1977) 72 Cal.App.3d 603, 616.) In other words, the omission of a duty is murder if the omission was malicious and there was deliberate intent to cause death, or where the omission must necessarily lead to death. (*People v. Burden*, *supra*, 72 Cal.App.3d at pp. 617, 619 [parent caused death of child by starvation]; see also *People v. Latham* (2012) 203 Cal.App.4th 319, 327, 332 [parental failure to obtain medical treatment for diabetic daughter constituted implied malice].)

"When a criminal statute does not set forth a legal duty to act by its express terms, liability for a failure to act must be premised on the existence of a duty found elsewhere." (*People v. Heitzman*, *supra*, 9 Cal.4th at p. 198.) Where a defendant takes charge of a person who is unable to prevent harm to himself, and the defendant's conduct creates a risk of injury to the victim, a legal duty to act may be implied. (*Id.* at pp. 198-199, referring to *People v. Oliver* (1989) 210 Cal.App.3d, at pp. 148-149.) In such cases, where death occurs because of the defendant's failure to act, a defendant may be found guilty of involuntary manslaughter. (*People v. Heitzman, supra,* 9 Cal.4th at pp. 198-199; see also, *People v. Valdez, supra,* 27 Cal.4th at p. 784.)

The general rule is that if death is the direct consequence of the malicious or intentional omission of the performance of a duty, such as of a mother's failure to feed her child, it is a case of murder; but if the omission is not willful, and arose out of neglect only, it is manslaughter. (*People v. Burden*, *supra,* 72 Cal.App.3d at p. 616.) The existence of a legal duty is a matter of law to be decided by the court. (*Kentucky Fried Chicken of Cal., Inc. v. Superior Court* (1997) 14 Cal.4th 814, 819.) The failure to act is not an "overt or affirmative" act absent a legal duty to act. (*People v. Partee* (2018) 21 Cal.App.5th 630, 639.) The court should instruct the jury if a legal duty exists and should not use generic terms to describe the relationship and duty owed. (CALCRIM No. 582, Bench Notes.)

"The omission of a duty in law is the equivalent of an act and when death results, the standard for determination of the degree of homicide is identical." (*People v. Burden,*

supra, 72 Cal.App.3d at p. 616.) A defendant's lack of concern as to whether the victim lived or died, expressed or implied, has been found to be substantial evidence of an "abandoned and malignant heart," sufficient to support second degree murder. (*Burden, supra,* at pp. 620-621, citing *People v. Jones* (1963) 215 Cal.App.2d 341, 345.)

In the present case, the use of the bracketed language in CALCRIM No. 520 was inappropriate without additional instructions defining the nature of the duty and explaining the People's burden of proving same. It was apparent from closing arguments that the People did not rely on a theory that the death was caused by defendant's breach of a legal duty to rescue.

During his summation, the prosecutor argued that defendant beat the victim to the point that the victim died. However, the prosecutor also argued that if the jury wanted to accept defendant's statements, it would have to conclude that defendant's actions of hitting the victim set off the chain of events leading to the victim's death. The prosecutor also argued that whether the jury believed Roberts' version of events, or accepted defendant's statements, he was guilty of murder because defendant left the scene, knowing that Roberts would kill the victim, and failed to stop her the third time, thereby aiding and abetting Roberts in her act of beating the victim.

The legal-duty language included in the murder instruction was improperly included because the People did not rely on a theory that defendant owed any legal duty of care or rescue. Certainly, the People did not introduce any evidence of such a duty, and the closing argument suggests the position that defendant had a *moral* duty to not

abandon the victim to Roberts' devices, if the jury believed defendant's statements to detectives. But the fact that defendant was convicted of murder demonstrates that the jury rejected any such theory, and concluded he either killed the victim himself, according to Roberts' version, or that he aided and abetted Roberts in killing the victim by participating in the aggravated assault. Thus, the instructional language was superfluous.

Notwithstanding, the inclusion of the bracketed language relating to the omission to act when under a duty of care or rescue, CALCRIM No. 520, as given, clearly informed the jury that to find defendant guilty of murder, it was required to find either that he intentionally committed an act, the natural and probable consequences of which were dangerous to human life, and that he acted with conscious disregard for human life, the elements of first and second-degree murder, and the need to find malice aforethought as a precondition of such a verdict. (CALCRIM No. 521.) The fact that the jury's first question during deliberation was whether fists qualified as a deadly weapon, along with defendant's own incriminatory statements that he thought he had killed the victim, support the conclusion that the jury found defendant's affirmative acts caused death directly, or aided and abetted Roberts' actions.

Additionally, to the extent defendant now objects to the court's modification of CALCRIM No. 520, his claim of error on appeal is forfeited by failing to object in the trial court. (*People v. Mora and Rangel* (2018) 5 Cal.5th 442, 471.) Once the trial court adequately instructs the jury on the law, it has no duty to give clarifying or amplifying

instructions absent a request. (*People v. Mayfield* (1997) 14 Cal.4th 668, 778; *People v. Butler* (2010) 187 Cal.App.4th 998, 1013.)

In reviewing a claim that the court's instructions were incorrect or misleading, we inquire whether there is a reasonable likelihood the jury understood the instructions as asserted by the defendant. (*People v. Cross* (2008) 45 Cal.4th 58, 67–68.) We consider the instructions as a whole and assume the jurors are intelligent persons capable of understanding and correlating all the instructions. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

While the inclusion of the "legal duty" language in CALCRIM No. 520 was error without further instruction, it was harmless where defendant did not object to the inclusion of the bracketed language, did not request further instructions to clarify the nature of the duty, and the instructions as a whole properly instructed the jury of the elements of murder.

b. *The Court Had No Sua Sponte Duty to Instruct on a Lesser Included Offense of Involuntary Manslaughter on a Misdemeanor-Battery Theory*.

Defendant argues the conviction must be reversed because the trial court failed to instruct the jury on involuntary manslaughter (CALCRIM No. 582), based on a misdemeanor battery theory. We disagree.

The court's duty to instruct on general principles of law governing the case includes an obligation to instruct "on lesser included offenses of the charged crime if substantial evidence supports the conclusion that the defendant committed the lesser

included offense and not the greater offense." (*People v. Gonzalez* (2018) 5 Cal.5th 186, 196, citing *People v. Breverman, supra,* at pp. 154-156; *People v. Shockley* (2013) 58 Cal.4th 400, 403.) The California Supreme Court has repeatedly held that there is no sua sponte duty to instruct on a lesser included offense unless there is substantial evidence that only the less serious crime was committed. (*People v. Williams* (1997) 16 Cal.4th 153, 227; *People v. Johnson* (1997) 58 Cal.App.4th 482, 490 [dis. opn. of Turner, P.J.]; see also, *People v. Bradford* (1997) 15 Cal.4th 1229, 1235.)

Misdemeanor-manslaughter is an unlawful killing without malice in the commission of an unlawful act not amounting to felony. (§ 192, subd. (b); *People v. Lee* (1999) 20 Cal.4th 47, 60-61.) It encompasses an unintentional killing in the course of a non-inherently dangerous felony committed without due caution or circumspection. (*People v. Brothers* (2015) 236 Cal.App.4th 24, 31; see also, *People v. Burroughs* (1984) 35 Cal.3d 824, 835, overruled on a different ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 88-91.)

Assault and battery, as misdemeanors, will support a conviction of involuntary manslaughter under the misdemeanor-manslaughter doctrine. (*People v. Clark* (1982) 130 Cal.App.3d 371, 382.) But defendant was not charged with misdemeanor battery, so an instruction on that theory in this case would not have been proper unless (a) misdemeanor battery is a lesser included offense within the greater crime of aggravated assault, or (b) defendant relied on that theory as a defense at trial and there was substantial evidence to show he was guilty of only that crime.

The misdemeanor-manslaughter doctrine only applies to a killing "in the commission of" a misdemeanor. (§ 192, subd. (b).) Defendant was not charged with felony-murder or misdemeanor murder; he was charged with malice-murder. An instruction on involuntary manslaughter may be justified where the defendant has killed without malice in the commission of an inherently dangerous assaultive felony, without either an intent to kill or a conscious disregard for life. (*People v. Bryant* (2013) 56 Cal.4th 959, 970.) Such a killing is not voluntary manslaughter where voluntary manslaughter requires either an intent to kill or a conscious disregard for life. (*Bryant, supra,* 56 Cal.4th at p. 970.)

However, involuntary manslaughter committed during an assaultive felony without malice is not a misdemeanor-manslaughter specie of involuntary manslaughter under *Bryant*. The evidence in the present case shows a brutal beating with a conscious disregard for life. An instruction on involuntary manslaughter was not warranted under *Bryant.*

The question is whether a misdemeanor battery-manslaughter instruction was required as a lesser included offense within the greater offense of assault by means likely to produce great bodily injury, or assault with a deadly weapon, assuming the jury found defendant guilty as an aider-abettor. Aggravated assault may be punished as either a felony or a misdemeanor (§ 245, subd. (a)(1)), but it remains a felony for all purposes up to the imposition of sentence. (§ 17; *People v. Rhodes* (1989) 215 Cal.App.3d 470, 476, & fn. 2, disapproved on a different ground in *People v. Barton* (1995) 12 Cal.4th 186,

198, fn. 7.) It would not support a misdemeanor-manslaughter instruction, although it might warrant an instruction on involuntary manslaughter as a killing without malice.

The next question is whether battery is a lesser included offense within the crime of aggravated assault. While an assault may be completed without any touching whatsoever, once a blow has been struck or a physical injury has been actually inflicted, the nature and extent of the injury is a relevant and often controlling factor in determining whether the force used was of felonious character. (*People v. Covino* (1980) 100 Cal.App.3d 660, 667; *People v. Wells* (1971) 14 Cal.App.3d 348, 358.) Defendant struck the victim with sufficient force to make his own hands swollen and red and the victim's injuries were extensive. The nature of the injuries here foreclosed the notion this could have been a misdemeanor-battery that resulted in death due to lack of due caution or circumspection. A court is not obliged to instruct on theories that have no evidentiary support. (*People v. Breverman, supra,* 19 Cal.4th at p. 162.)

We also reject the theory that a sua sponte instruction on misdemeanor battery-manslaughter was required as a lesser included offense of murder, on the theory defendant intended to aid or abet an aggravated assault. Misdemeanor battery is not a lesser included offense within the greater offense of aggravated assault. "A battery is any willful and unlawful use of force or violence upon the person of another." (§ 242.) "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) While every completed battery includes an assault,

battery is not included within assault. (*In re Robert G.* (1982) 31 Cal.3d 437, 441; *People v. Yeats* (1977) 66 Cal.App.3d 874, 878.)

We must also determine whether the evidence shows a lack of malice, such that an instruction on misdemeanor-manslaughter was required. Punching a smaller, older, victim with fists is inherently dangerous. (See *People v. Guillen* (2014) 227 Cal.App.4th 934, 985; see also, *People v. Cravens* (2012) 53 Cal.4th 500, 508.) Such an act of violence shows a conscious disregard for life, that is, implied malice, and an instruction on involuntary manslaughter is not required where the charges, and the evidence adduced as proof thereof, show malice. (See *Bryant, supra,* 56 Cal.4th at p. 970.) Because the natural consequences of defendant's conduct were dangerous to life, there is no basis for an instruction on misdemeanor battery to support an involuntary manslaughter theory on that ground. The jury was properly instructed on voluntary manslaughter, so there was no error.

c. *The Court Was Not Required to Instruct on a Theory of Involuntary Manslaughter Based on a Breach of Duty of Care*.

Defendant argues that insofar as the court instructed the jury with the modified language of CALCRIM No. 520, regarding a legal duty to rescue, the jury also should have been instructed on the theory of involuntary manslaughter based on a breach of duty of care. (CALCRIM No. 582.) Defendant does not attempt to argue that involuntary manslaughter based on a breach of duty of care is necessarily included in a charge of

murder based on implied malice, and does not argue that he relied on this defense at trial, or that he requested the instruction. We therefore disagree.

Neither the People nor the defendant presented any evidence to support a theory that defendant owed a legal duty, such as would properly form the basis for an involuntary manslaughter conviction grounded on an omission to act. Nor does the evidence support a conclusion that the death was the result of negligence, which is the gravamen of manslaughter related to breach of a legal duty, given the forcefulness of the beating. Defendant admitted to detectives that he punched the victim in the face several times and kicked him; he also made statements that he thought he had killed the victim; a beating is a willful act, not an accidental one. The death did not result from an omission to act or a negligent act.

Defendant cites no authority for the proposition that a negligent homicide is necessarily included within a charge of malice-murder, such that a sua sponte instruction on the theory was required. Absent evidence that the death occurred as a result of criminal negligence on the part of defendant, and confronted with a record demonstrating a brutal beating, we cannot say there is substantial evidence that only the less serious crime was committed, requiring the court to instruct on a particular lesser included offense. Such an obligation arises when there is some substantial evidence to indicate that the defendant may be not guilty of the greater offense but guilty of the lesser offense. (*People v. Wickersham* (1982) 32 Cal.3d 307, 323-325; *People v. Eilers* (1991) 231 Cal.App.3d 288, 293.)

"A court is not obligated to instruct sua sponte on involuntary manslaughter as a lesser included offense unless there is substantial evidence, i.e., evidence from which a rational trier of fact could find beyond a reasonable doubt [citation] that the defendant killed his victim 'in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection' [citation]." (*People v. Berryman* (1993) 6 Cal.4th 1048, 1081; see also *People v. Breverman*, *supra*, 19 Cal.4th 142, 162 ["'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed"].)

Assault is a general intent crime, that does not involve mere recklessness or criminal negligence. (*People v. Williams* (2001) 26 Cal.4th 779, 788.) Manslaughter based on gross negligence is not necessarily included in a charge of malice-murder; it is a lesser related offense. (See *People v. Sanchez* (2001) 24 Cal.4th 983, 991, overruled on another ground in *People v. Reed* (2006) 38 Cal.4th 1224, 1228–1229; see also, *People v. Johnson* (2016) 6 Cal.App.5th 505, 513.) A theory of involuntary manslaughter due to breach of a duty of care is not necessarily included within the charge of murder requiring a sua sponte instruction.

Had evidence supporting a theory of negligent homicide been introduced, the theory would be viable only as a lesser *related* offense, and a trial court is not obliged to instruct a jury on lesser *related* offenses even if requested by a defendant. (*People v.*

Mora and Rangel, supra, 5 Cal.5th at p. 486, citing *People v. Birks* (1998) 19 Cal.4th 108, 112-113; see also, *People v. Manriquez* (2005) 37 Cal.4th 547, 587-588.) Even if considered as a pinpoint theory, it was incumbent upon defendant to request instructions on that theory if, indeed, he relied on it. (See *People v. Hunter* (2011) 202 Cal.App.4th 261, 276, citing *People v. Sears* (1970) 2 Cal.3d 180, 190.)

Because no evidence was introduced in trial to support a theory of criminal negligence, and because the defendant neither relied on this theory at trial, nor requested the instruction, the court was under no obligation to give CALCRIM No. 582 as an instruction to the jury.

d. *Denial of the New Trial Motion Based on the Inadvertent Submission of a Verdict Form Relating to Defendant's Prior Prison Term was Proper*.

The enhancement allegation relating to defendant's prior prison term was bifurcated from the murder charge but the verdict form for the allegation was inadvertently submitted to the jury with the other verdict forms. The court and counsel discovered the mistake when the jury sent out a question during deliberations, inquiring about when defendant's term of custody had ended. At that point, the trial court brought the jury into the courtroom, informed the jury that the verdict form had been given to them by mistake, and instructed them to ignore the accusation.

Defendant did not make a motion to declare a mistrial, although he did make an oral motion for new trial.[6] No memorandum of points and authorities was filed in support of the motion, but the single page motion referred to section "1181.6," and, at the hearing, the defendant clarified that the ground for the motion was that covered in section 1181, subdivision (6), requesting that the court modify the degree of the crime. Defendant mentioned the inadvertent submission of the verdict form as support for this argument but did not argue for a new trial based on the jury's receipt of extrinsic material.

On appeal, defendant argues the trial court erred by submitting the errant verdict form, requiring reversal. In the alternative, he argues that defense counsel was ineffective for failing to review the verdict forms before they were submitted to the jury. We disagree.

A motion for new trial may be made on the ground that the jury has received extrinsic evidence (§ 1181, subd. (2)), or that the jury is guilty of misconduct. (§ 1181, subd. (3).) "A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion. [Citation.]" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1260-1261.) However, a defendant must specify the grounds relied upon in making a motion for new trial, and a failure to raise those grounds in the trial court

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[6] A new trial motion may be made either orally or in writing. (*People v. Braxton* (2004) 34 Cal.4th 798, 807.)

forfeits the issue for appeal. (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 332; *People v. Masotti* (2008) 163 Cal.App.4th 504, 508.) And "[a] motion for new trial may be granted only upon a ground raised in the motion." (*People v. Masotti, supra,* 163 Cal.App.4th at p. 508.)

Even if defendant's oral motion, mentioning the jury's receipt of the verdict form, could be construed as requesting a new trial on that ground, his failure to obtain a ruling on that issue forfeits the issue on appeal. (*People v. Braxton, supra,* 34 Cal.4th at p. 814; *People v. Murphy* (1962) 207 Cal.App.2d 885, 888-890.) Here, the trial court ruled on the ground specified in section 1181, subdivision (6), denying the request to reduce the degree of the crime from first degree murder. It did not rule on any other ground for new trial. The issue was forfeited.

Even if the issue had been properly preserved, we would find no error. The applicable standard of prejudice of "ordinary error" is utilized in cases where a jury has innocently viewed extrinsic evidence. (*People v. Clair* (1992) 2 Cal.4th 629, 668.) In such cases there has been no juror misconduct and no improper outside influence. (*Ibid.*) "[W]ith "ordinary error," prejudice must be shown and reversal is not required unless there is a reasonable probability that an outcome more favorable to the defendant would have resulted." (*Ibid.*)

The situation where a jury innocently considered evidence it was inadvertently given is the same as any in which the court has erroneously admitted evidence. (*People v. Gamache* (2010) 48 Cal.4th 347, 396-397, citing *People v. Cooper* (1991) 53 Cal.3d

771, 836.) In such situations we must ask whether, in light of all the other evidence properly admitted, the verdict reached would have been the same absent exposure to the never-admitted evidence. (*People v. Gamache*, *supra*, 48 Cal.4th at p. 397.)

Here, there was no prejudice because there was no reasonable probability of a more favorable outcome: the reference to defendant's prior drunk driving arrest, even considering the inadvertent receipt of the verdict form, must be measured against the considerable evidence against defendant. The jury had already heard the testimony of the detectives who interviewed the defendant, and heard the tape of the interview in which appellant told the detectives about his prior arrest for driving under the influence, and therefore understood the judicial process. Additionally, the trial court promptly gave curative instructions, and the jury is presumed to follow the instructions given it. (See *People v. Avila* (2006) 38 Cal.4th 491, 573.)

As for defendant's alternative claim that his trial counsel was ineffective for failing to examine the instructions so as to catch the error, defendant has failed to demonstrate prejudice, in which circumstance we may reject the claim without determining the deficiency or sufficiency of counsel's performance. (*People v. Carrasco* (2014) 59 Cal.4th 924, 982; *People v. Mendoza* (2000) 24 Cal.4th 130, 164; *People v. Kipp* (1998) 18 Cal.4th 349, 366, 368.)

There was no error.

e. *There was no cumulative prejudice requiring reversal*

Defendant argues that the cumulative impact of the errors was prejudicial. We disagree.

It is true that a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Hill* (1998) 17 Cal.4th 800, 844.) However, we have found only harmless error pertaining to the inclusion of bracketed language in CALCRIM No. 520. There was no series of trial errors resulting in prejudice to defendant, so there was no cumulative error.

"Defendant was entitled to a fair trial, but not a perfect one." (*People v. Cunningham, supra,* 25 Cal.4th at pp. 926, 1009, and cases cited; see also, *People v. Jasso* (2012) 211 Cal.App.4th 1354, 1378.) Defendant was not deprived of a fair trial.

2. The sentence must be modified to reduce the assessments imposed.

Following resentencing on remand, the trial court imposed a Court Security Fee of $360, pursuant to Penal Code section 1465.8, and a criminal conviction assessment in the amount of $270, pursuant to Government Code section 70373. The amount was calculated based on the probation report, which incorrectly assumed defendant had suffered nine convictions. Defendant argues the assessments must be reduced because defendant was convicted of a single count. The People agree. We also agree.

Section 1465.8, subdivision (a)(1), authorizes an assessment of $40 on every conviction for a criminal offense, to assist in funding court operations. Government Code section 70373, subdivision (a)(1), authorizes the imposition of an assessment in the

amount of $30 on every conviction for a criminal offense for the funding of court facilities. The fees apply to each count of which a defendant has been convicted, regardless of whether any count is stayed pursuant to section 654. (*People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866 [§ 1465.8]; *People v. Castillo* (2010) 182 Cal.App.4th 1410, 1415, fn. 3 [Govt. Code, § 70373]; *People v. Sencion* (2012) 211 Cal.App.4th 480, 483-484 [both; assessment applies even to stayed counts].)

The sentence is modified to reduce the court security fee imposed pursuant to Penal Code section 1465.8 to $40, and to reduce the criminal conviction assessment imposed pursuant to Government Code section 70373 to $30.

DISPOSITION

The sentence is modified to reduce the penalty assessment/fine imposed under Penal Code section 1468.5 to $40.00, and to reduce the penalty assessment/fine imposed under Government Code section 70373 to $30.00. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

CODRINGTON
J.